Supreme Court, U.S.
FILED

(1)

No. 95-921 DEC 12 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JOSEPH B. SHUMATE, JR.,

Petitioner,

v.

H. W. HUFF, JR. and
THOMAS J. MCCARTHY, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

The 14th Amendment of the federal Constitution provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state therein they reside, and that the states are forbidden to deny any person within their jurisdiction the equal protection of the laws.

The purpose of Federal Civil Rights Statute 42 U.S.C. §1983 authorizing action at law, suit and equity, or other proper proceedings for redress of deprivation, under color of state law, of rights secured by federal constitution and federal laws, is to interpose federal courts between state and people, as guardians of people's federal rights, and thus to protect people from unconstitutional action under color of

state law, whether that action be executive, legislative, or judicial.

The questions presented are as follows:

1. Whether the Supreme of Virginia denied the petitioner equal protection of the law in upholding the Circuit Court of Pulaski County, Virginia, that a bill of review does not lie to challenge, upset or stay enforcement of a final decree and permanent injunction which is contrary to Virginia Code §8.01-623 and previous recent decisions of the Supreme Court of Virginia in banc.

2. Did the Supreme Court of Virginia deny the petitioner equal protection of the law in finding no error in law by the Circuit Court granting McCarthy an easement over properties of which the owner of these properties never granted such an easement.

3. Since McCarthy can not claim the use of the easement through the Huff Subdivision by implication or necessity, the Supreme Court of Virginia has denied Shumate equal protection of the Virginia Easement Law.

4. If easements once created may be extinguished by conveying the servient estate to purchaser without notice of the easement, the Supreme Court of Virginia has denied Shumate his equal protection of the law by finding no reversible error.

5. Whether Shumate was denied equal protection of the law by the Supreme Court of Virginia failing to uphold Shumate's statutory right to erect and maintain gates across private roads pursuant to Virginia Code §33.1-202.

6. Is a non-consenting tenant bound by an agreement purporting to lease the

property or any specific portion thereof. Did the Supreme Court of Virginia deny Shumate his equal protection of Virginia law by finding no error in Mr. Huff granting Mr. McCarthy an easement over jointly undivided property equally owned by Shumate and Huff without Shumate's permission.

7. Whether the Supreme Court of Virginia violated Shumate's equal rights by finding no error in the Circuit Court's holding that the portion of the roadway which runs through the hydroelectric project parcel 45-A constitutes a relocated part of the Elkins right of way and is subject to valid no-gate restrictions contained in the Elkins easement.

LIST OF PARTIES

The parties are the petitioner, Joseph B. Shumate, Jr., and the respondents are H. W. Huff, Jr. and Thomas J. McCarthy, Jr.

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1. In all the questions presented the Circuit Court of Pulaski County, Virginia has ruled contrary to Virginia Code and contrary to previous decisions of the Supreme Court of Virginia on these issues. The panel of the Supreme Court of Virginia hearing this case by not reversing previous decisions of the Supreme Court of Virginia on these matters and not hearing the petition has denied Shumate equal protection of the laws of the Commonwealth of Virginia.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JOSEPH B. SHUMATE, JR.,

Petitioner

v.

H. W. HUFF, JR., et. al.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The petitioner, Joseph B. Shumate, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in the above entitled proceeding on August 8, 1995, petition for rehearing denied on September 15, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia denying rehearing is reported in the Appendix hereto, p. 1 infra.

The opinion of the Supreme Court of Virginia refusing the petition for appeal is reported in the Appendix hereto p. 2 infra.

The opinion of the Circuit Court of Pulaski County, Virginia dated February 19, 1995 denying bill of review is reported in the Appendix hereto p. 4 infra.

The opinion of the Circuit Court of Pulaski County, Virginia granting McCarthy permanent easement through properties of others dated November 28, 1994, is reprinted in the Appendix hereto p. 9 infra.

JURISDICTION

The jurisdiction of this court to review the judgment of the Supreme Court of Virginia is invoked under 28 U.S.C. §1257(3)

STATUTES INVOLVED

1. Virginia Code §8.01-623, reprinted in the Appendix hereto, p. 15a, infra.

2. Virginia Code §33.1-202, reprinted in the Appendix hereto, p.16a, infra.

3. Rule 1:1 of the Supreme Court of Virginia, reprinted in the Appendix hereto, p. 17a, infra.

STATEMENT OF THE CASE

The petitioner, Joseph B. Shumate, Jr., is the owner, joint owner, lessor and joint lessor of properties in a subdivision or adjacent to the Huff Subdivision adjacent to a hydroelectric project in Pulaski County, Virginia.

The developer of the Huff Subdivision, principal H. W. Huff, Jr., (respondent) sold the parcels in the subdivision in 1953 keeping a small portion of the property for himself. Mr. Huff acquired additional acreage adjacent to the subdivision and sold 1/2 undivided interest in the additional acreage to Joseph B. Shumate, Jr., the petitioner, in 1972 to provide a buffer zone for the subdivision.

The parcel provided another easement to ingress to and egress from the Huff Subdivision. The respondent Mr. Huff,

deeded an easement over the newly acquired property to all landowners of the Huff Subdivision. Mr. Huff also deeded an easement over the newly acquired property to the other respondent, Thomas J. McCarthy, Jr., whose property was east of the subdivision but and not adjacent to the subdivision.

The original easement to the subdivision ran east from the Huff Subdivision being close to the McCarthy property which McCarthy had an easement to use but not the easement over the various parcels of the Huff Subdivision. Some of the easement was over land owned by the hydroelectric project.

The McCarthy cabin was not used as a permanent residence and the land owners of the Huff Subdivision gave McCarthy parol permissive use only of the private

easement and roadway through the various property owned or leased by the Huff Subdivision owners.

Mr. McCarthy's permissive use was strictly enforced by periodic closing of the private easement to all parties including Mr. McCarthy that were not owners of a parcel of land in the Huff Subdivision. The easement in the Huff Subdivision was fenced.

Mr. McCarthy became a permanent resident on his lake property living full time on the lake approximately 7 months a year. There became a dispute between McCarthy and Shumate as to Shumate's animals running at large on McCarthy's property. Shumate's land was partially surrounded by water the balance not adjacent to the water was fenced. In order to keep his animals on his property he gave notice revoking McCarthy's

permissive use over Shumate's property and placed a gate over the easement to keep his animals off of McCarthy's property. No one else used the easement to or through McCarthy's property.

The respondents filed a motion to enjoin Shumate from gateing the easement over his property and to grant McCarthy a permanent easement over Shumate's and other's property in the Huff Subdivision. The court entered a final order granting McCarthy easement over Shumate's property and a permanent injunction enjoining Shumate from gateing the private easement over his property on November 28, 1994.

The right of Huff to use the private easement over Shumate's property was never challenged as Huff being a property owner in the Huff Subdivision had the same rights Shumate had. Huff has not used the easement over Shumate's property

for over 25 years as he uses another easement to his property. The property owners of the Huff Subdivision pay road improvement and maintenance cost proportionately only on the part of the Huff Subdivision easement they use. For Huff to use the improved easement over Shumate's property he would have to pay for 1/2 of the improvement and maintenance of the easement over Shumate's property as no other property owner in the Huff Subdivision uses the easement over Shumate's property.

This matter being in chancery Shumate filed a bill of review challenging errors of law by the circuit court's ruling which was denied and dismissed with prejudice.

The Supreme Court of Virginia found no reversible error in the judgment complained of.

REASONS FOR GRANTING THE WRIT

In all the issues presented the Circuit Court of Pulaski County, Virginia has ruled contrary to Virginia Code and contrary to previous decisions of the Supreme Court of Virginia on these issues. The panel of the Supreme Court of Virginia hearing this case by not reversing previous decisions of the Supreme Court of Virginia on these matters and not hearing the petition has denied Shumate equal protection of the laws of the Commonwealth of Virginia.

1. Whether the Supreme of Virginia denied the petitioner equal protection of the law in upholding the Circuit Court of Pulaski County, Virginia, that a bill of review does not lie to challenge, upset or stay enforcement of a final decree and permanent injunction which is contrary to Virginia Code §8.01-623 and previous recent decisions of the Supreme Court of Virginia in banc.

Shumate filed for a bill of review

and suspension of the injunction pending review on December 7, 1994, being nine days after the order was executed and 12 days before the order became final pursuant to Rule 1:1 of the Supreme Court of Virginia. The Circuit Court erraneously relied on Rule 1:1 governing a bill of review. A bill of review is governed by Virginia Code §8.01-623. It grants the appellant six months from date of order to move for a bill of review. If a bill of review is asked for the court has the authority to grant an injunction against the decree subject to decision on the bill of review. The Supreme Court of Virginia in Blount v. Lentz, 44 S.E. 2d 62 (VA. 1991) held that a bill of review remains an available procedure devise until abolished by the General Assembly. It held further that if error of law be apparent from an

inspection of the record in the cause and a final decree has been entered, a proper case for a bill of review is prima facia presented. The Virginia Supreme Court further held that the trial court was required to examine both the record and the decree to determine whether errors of law existed. Based on the statute as interpreted by the Supreme Court of Virginia in Blount, supra the Circuit Court erred in law in holding that a bill of review does not lie to challenge, upset or stay enforcement of a final decree and permanent injunction entered November 28, 1994. The trial court also erred in holding that a bill of review was improper and should be raised by appeal to the Supreme Court of Virginia as the Supreme Court of Virginia's ruling that 8.01-623 is still a viable statute as interpreted by that Court in Blount,

supra. The trial court also erred in stating that the defendant failed to obtain a stay of the prior decree within 21 days of the entry of said decree as is his burden and that a final decree and permanent injunction entered on November 28, 1994, became final under Rule 1:1 of the Supreme Court on December 19, 1994.

The trial court holding that because the defendant failed to obtain a stay of the November 28, 1994 decree within 21 days of the date of entry of said decree and that the final decree and permanent injunction entered on November 28, 1994 because final under Rule 1:1 of the Supreme Court on December 19, 1994 is also error of law as Rule 1:1 has no affect on a bill of review. Virginia Code §8.01-623 governs time to file a bill of review which states

"no bill of review shall be

allowed to a final decree unless it be exhibited within six months next after such decree"

The Supreme Court of Virginia has denied Shumate equal protection of Virginia law as previously interpreted by the highest court of Virginia in finding no reversible error in the lower court denying Shumate a bill of review pursuant to Virginia Code §8.01-623.

2. Did the Supreme Court of Virginia deny the petitioner equal protection of the law in finding no error in law by the Circuit Court granting McCarthy an easement over properties of which the owner of these properties never granted such an easement?

Under Virginia law a real covenant can not operate so as to pass to an assignee of land unless the vendor has a capacity to convey the land itself to which the covenant is a incident.

Michie's Jurisprudence, Covenants Running With the Land §11; Randolph's Administrix v. Kinney, 24 VA. (3 Rand.) 394 (1825).

When the hydroelectric project owner sold off the Huff Subdivision there were no roads to or through the Huff Subdivision and the seller reserved no easement rights for McCarthy through the Huff Subdivision.

When Huff sold off the parcels in the Huff Subdivision in 1953 there was no intent or reservation by Huff to burden the parcels of the Huff Subdivision with easements for property foreign to the Huff Subdivision.

McCarthy's property is definitely not part of the Huff Subdivision. See p. 19a, infra. The law of Virginia at this time is that the easement for a parcel may not be expanded to benefit other properties as this action would impose an

additional burden on the servient estate which was not intended in the estate. Walton v. Holland, 385 S.E. 2d 609 (VA 1989).

3. **Since McCarthy can not claim the use of the easement through the Huff Subdivision by implication or necessity, the Supreme Court of Virginia has denied Shumate equal protection of the Virginia Easement Law.**

McCarthy can not use the easement through the Huff Subdivision by implication or necessity. There are three requirements to prove easement by implication in Virginia:

(1) The dominant and servient tracts must originate from a common grantor. McCarthy's property came from the hydroelectric project. The 30 foot roadway from the cul-de-sac to the end of State Route

669 to hydroelectric project property had been sold by the hydroelectric project years before McCarthy bought his property from APCO.

(2) The easement was not in use at the time of the severance of the property. There was no roadway from McCarthy's property to the Huff Subdivision at the time APCO sold the property to McCarthy.

(3) That the use is apparent, continuous, and reasonably necessary for the enjoyment of the dominant tract. McCarthy's use was not apparent and continuous since he was allowed to go through the Huff Subdivision by permission only and the road being periodically

closed to enforce the permissive right.

The easement was not reasonably necessary for the enjoyment of the dominant tract because McCarthy had a deeded easement to his property by another way. Russakoff v. Scruggs, 400 S.E. 2d 529, 533 (VA. 1991).

If another means of access exists, though less convenient or is more expensive to develop, no way of necessity arises. Fones v. Fagan, 196 S.E. 2d 916, 919 (1973); also see Haynie v. Brenner, 222 S.E. 2d 546, 548 (VA. 1976).

4. If easements once created may be extinguished by conveying the servient estate to purchaser without notice of the easement, the Supreme Court of Virginia has denied Shumate his equal protection of the law by finding no reversible error.

If the hydroelectric project owner ever granted an easement to McCarthy over

the Huff Subdivision it was terminated when the project owner sold the Huff Subdivision property in 1953 as the seller of the Huff Subdivision did not reserve any easement for McCarthy to ingress or egress to his property over the Huff Subdivision property.

Under Virginia law easements once created may be extinguished by conveyance of the servient estate to a purchaser without notice of the easement. Michie's Jurisprudence, Easements, §17.

Easements are extinguished by the transfer of a servient tract to a purchaser without notice. It is a well established principal governing the purchase of servient tenements that an easement therein is extinguished unless the purchaser has either an actual notice of the existence of the easement, or constructive notice from the recordation

of the express grant or reservation creating it. 1 Minor on Real Property, Extinguishment by Transfer to Purchasers, §113.7 (2d. E.D. Ribble)

The Virginia Supreme Court has held that where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of any such claim, he takes a property without the burden of any such claim, either from the grantor or any person claiming under him. Where the deed conveys, without reservation, the grantee takes all conveyed unincumbered. Deacons v. Doyle, 75 VA. 258 (1881); Ricks v. Scott, 117 VA. 370 (1915); Russakoff, supra at page 533.

5. Whether Shumate was denied equal protection of the law by the Supreme Court of Virginia failing to uphold Shumate's statutory right to erect and maintain gates across private roads pursuant to Virginia Code

§33.1-202.

Virginia Code §33.1-202 states that any person owning land over which another or others have a private road or right of way may, except when it is otherwise provided by contract, erect and maintain gates across such roads or right of way at all points at which fences extend to such roads on each side thereof.

The 12 foot roadway in the Huff Subdivision is not an open way. A land owner may erect gates if road is not an open way. Hartsock v. Powell, 199 VA. 320 (1957).

§33.1-202 gives the owner of the servient tract the right to erect and maintain a gate when there is no instrument or contract providing otherwise. Craig v. Kennedy, 202 VA. 654 (1961).

6. Is a non-consenting tenant bound by an agreement purporting to lease the property or any specific portion thereof. Did the Supreme Court of Virginia deny Shumate his equal protection of Virginia law by finding no error in Mr. Huff granting Mr. McCarthy an easement over jointly undivided property equally owned by Shumate and Huff without Shumate's permission.

Under Virginia law a non-consenting tenant is not bound by an agreement purporting to lease the property or any specific portion thereof. Chosar Corp. v. Owens, 370 S.E. 2d 305, 307 (1988), see also Phillips v. Dulaney, 114 VA. 681, 683 (1913). Mr. Huff can not grant an easement over part of the road unless he had the capacity to convey the whole road, which he did not have. Michie's Jurisprudence, Covenants, supra; Randolph's Administrix, supra.

Only the owner of a fee simple title can create such an easement. U. S. v. Bell View Apts., 217 f 2d. 636 (4 CCA

1954).

7. Whether the Supreme Court of Virginia violated Shumate's equal rights by finding no error in the Circuit Court's holding that the portion of the roadway which runs through the hydroelectric project parcel 45-A constitutes a relocated part of the Elkins right of way and is subject to valid no-gate restrictions contained in the Elkins easement.

Mr. Huff testified that he and Mr. Elkins, who owned no property in the Huff Subdivision, built the road across parcel 45-A. Neither Mr. Huff nor Mr. Elkins owned or leased parcel 45-A.

Under Virginia law neither Mr. Huff nor Mr. Elkins had any legal authority to move a deeded easement onto someone else's property. No party may place covenants on property they can not convey. Randolph's Administrix, supra.

Shumate and Huff have jointly leased for several years parcel 45-A. The lease

does not reserve an easement through 45-A for McCarthy or anyone else. The lease does not prevent the lease holders from fencing or gateing the property.

Easements may be changed only with the expressed or implied consent of all interested parties. Wagoneer v. Jack's Creek Coal Co., 101 S.E. 2d 627 (1958).

Thus the no gate clause in the Elkins easement can not legally apply to parcel 45-A

CONCLUSION

In this case, as pointed out above, the Supreme Court of Virginia in recognizing no reversible error in the judgments complained of has denied Shumate equal protection of the law as guaranteed by the 14th Amendment of the federal constitution and federal civil rights statute 42 U.S.C. §1983.

The petitioner asks this court to exercise its power to interpose between states and people as guardian of Shumate's federal rights and protect him from the above elaborated unconstitutional actions denying him equal protection under Virginia property laws and appellant procedures by the Virginia judicial system.

For the foregoing reasons, the petition for writ of certiorari should be granted.

APPENDIX

DOCUMENT:	Page
Virginia Supreme Court order of September 15, 1995	1a
Virginia Supreme Court order of August 8, 1995	2a
Pulaski County Circuit Court order dated February 8, 1995	4a
Pulaski County Circuit Court order dated November 28, 1994	9a
Virginia Code §8.01-623	16a
Virginia Code §33.1-202	17a
Rule 1:1 of the Supreme Court of Virginia	18a
Plat showing Huff Subdivision and lands adjacent to or near Huff Subdivision and roads thereto	19a

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 15th day of September, 1995.

Joseph B. Shumate, Jr., Appellant,

against Record No. 950823
Circuit Court No. CH93000158

H. W. Huff, Jr., et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 8th day of August, 1995 and grant a rehearing thereof, the prayer of the said petition is denied.

Senior Justice Poff took no part in the consideration of this case.

A Copy,
Teste:
Signed by Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 8th day of August, 1995.

Joseph B. Shumate, Jr., Appellant,

against Record No. 950823
Circuit Court No. CH93000158

H. W. Huff, Jr., et al., Appellees.

From the Circuit Court of Pulaski County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Senior Justice Poff took no part in the consideration of this case.

A Copy,
Teste:
David B. Beach, Clerk
Signed by Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY

H.W HUFF, JR.
THOMAS J. MCCARTHY, JR.,

Plaintiffs

v.

JOSEPH B. SHUMATE, JR.

Defendant

DECREE

Chancery No. H-93-158

On January 27, 1995 (continued from January 26, 1995), came the plaintiffs in person and by counsel, and the defendant in person, (1) on defendant's "Motion for Bill of Review, etc." filed herein on December 7, 1994, and on plaintiffs' Objection as filed thereto, and (2) on plaintiffs' sworn motion to hold defendant in contempt of this Court for failure to comply with the terms of a Final Decree and Permanent Injunction entered herein on November 28, 1994, on prior written notice of hearing to

defendant, and on a show cause Order entered herein on January 6, 1995 and personally served on defendant on January 10, 1995, and the Court heard ore tenus the arguments of defendant and of plaintiffs' counsel.

After due consideration of the record in this case and the arguments regarding defendant's motion for bill of review, the Court finds (1) no error of law in the record, (2) that a bill of review does not lie to challenge, upset, or stay enforcement of the Final Decree and Permanent Injunction entered herein on November 28, 1994, (3) that defendant's contentions as asserted in his motion are matters which should have been raised by appeal to the Supreme Court of Virginia, (4) that defendant failed to obtain a stay of the prior Decree within 21 days of the date of

entry of said Decree, as is his burden, and (5) that the Final Decree and Permanent Injunction entered herein on November 28, 1994 because final under Rule 1:1 of the Virginia Supreme Court on December 19, 1994;

Accordingly, it is ADJUDGED, ORDERED, and DECREED that defendant's "Motion for Bill of Review and Suspension of Final Decree and Injunction Pending Review" is denied and dismissed with prejudice.

Upon consideration of plaintiffs' contempt motion, the Court finds as fact from the plaintiffs' evidence and from the admission of defendant that defendant has failed to comply with the terms of said Permanent Injunction entered against him on November 28, 1994 by failing to open and keep open the gate which he erected over the road within plaintiffs'

right of way and by continuing to close and block said road and right of way. However, based on defendant's assurance made to the Court that he would (1) open the gate on January 27, 1995, and (2) keep the gate open and the roadway unobstructed, as he was enjoined to do, unless and until otherwise ordered by a court of competent jurisdiction,, the Court does not hold defendant in contempt at this time, but the Court may reconsider holding defendant in contempt should he fail to open and keep open said gate as he has assured the Court he will do.

The Court takes under advisement plaintiffs' motion for sanctions, including an award of their costs and attorney's fees in this contempt proceeding.

The Clerk shall certify and mail

copies of this Decree to plaintiffs' counsel and to defendant.

Entered this 8th day of February, 1995, for January 27, 1995.

/s/ Ernest W. Ballou
Judge-Designate

Requested in part; seen in part:

/s/ Samuel D. Campbell
P.O. Box 945
Pulaski, VA 24301
counsel for plaintiffs

Seen and objected to:

/s/ Joseph B. Shumate, Jr.
P.O. Box 2092
Pulaski, VA 24301
defendant pro se

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY

H.W HUFF, JR.
THOMAS J. MCCARTHY, JR.,

Plaintiffs

v.

JOSEPH B. SHUMATE, JR.

Defendant

FINAL DECREE and PERMANENT INJUNCTION
Chancery No. H-93-158

On November 28, 1994, came the plaintiffs, by counsel, and the defendant in person, on the motions for summary judgment filed by each party, and in connection with said motions, at the Court's request, the parties presented evidence which the Court heard ore tenus.

Upon consideration of evidence before the Court, the pleadings, the memoranda of law and exhibits as previously filed by each party and made part of the record, and the parties' respective arguments, the Court is of the

opinion (1) that the dispositive issues presented in this case are questions of law, (2) that no material issue of fact is genuinely in dispute in this case, and (3) that plaintiffs are entitled to the relief sought in Count I of their Bill of Complaint as a matter of law.

As stated in the record of today's hearing, the Court finds as a matter of law and adjudges and decrees (1) that plaintiffs, Thomas J. McCarthy, Jr. and H. W. Huff, Jr., each have a lawful right of way over the entire roadway as shown on trial Exhibit A, being a certified photocopy of a plat dated January 28, 1972, recorded in the Clerk's Office of this Court in Plat Book 5, page 75; (2) that plaintiff McCarthy's right of way over the roadway from the end of the "Elkins right of way" (as identified in the record) to the cul-de-sac at the end

of Virginia Secondary Route 669 is by virtue of a senior grant from Appalachian Power Company (APCO) under trial Exhibit M; (3) that both plaintiffs have lawful rights of way over the roadway in all places where it is located on land owned by APCO by virtue of grants to each of them from APCO; (4) that defendant has no legal right to gate or otherwise obstruct any portion of the roadway as shown on trial Exhibit A, which runs from the cul-de-sac at the end of Virginia Secondary Route 669 to and through the property of Thomas J. McCarthy, Jr., as shown on said plat; and (5) that that portion of the roadway which runs through "APCO Parcel 45-A" along its northern boundary (as shown on trial Exhibit A) constitutes a relocated part of the "Elkins right of way" (as identified in the record) and is therefore subject to the valid "no gate"

restriction contained in the "Elkins deed" (trial Exhibit H).

Accordingly, it is ADJUDGED, ORDERED, and DECREED:

1. That defendant's "[Motion for] Leave of Court to File Cross Bill of Complaint," previously filed herein, is denied;

2. That defendant's motion for summary judgment is denied;

3. That on motion of plaintiffs, plaintiffs are granted a voluntary non-suit as to Count II of their Bill of Complaint, and same is hereby dismissed without prejudice, pursuant to Virginia Code §8.01-380;

4. That within 10 calendar days of the date of entry of this Decree, defendant, Joseph B. Shumate, Jr., shall fully remove the existing gate which he has placed in the right of way of and across

the roadway;

5. That defendant, Joseph B. Shumate, Jr., is permanently enjoined from placing any gate(s) or other obstacle(s) in, over, on, across, or about any portion of the roadway shown on Exhibit A (as referred to above);

6. That pursuant to Virginia Code §14.1-178, plaintiffs are awarded judgment against defendant for their costs of $61.00 incurred herein, which amount, if not paid in full within 21 calendar days of the date of entry of this Decree, shall bear interest at the judgment rate of 9%, and the Clerk of this Court shall then docket this judgment and issue such execution as authorized by law on application of plaintiffs;

7. That plaintiffs' are hereby released on their injunction bond, and the Clerk

shall refund plaintiffs' $100.00 cash bond amount to them;

8. That as a cost of this case, defendant shall pay the per diem and any transcript charges of the court reporter, Blue Ridge Court Reporting, for the November 28, 1994 evidentiary hearing; and

9. That defendant shall pay the fees and expenses of his subpoenaed witness, Robert A. Henegar, as provided under Virginia Code §14.1-190.

The Court grants defendant 10 calendar days from the date of entry of this Decree to file any exceptions to the Court's ruling which he may desire to make.

The Clerk shall certify and mail copies of this Decree to plaintiffs' counsel and to defendant, then file this case among the ended chancery cases.

Entered this 28 day of November, 1994.

/s/ Ernest W. Ballou
Judge-Designate

Requested:

/s/ Samuel D. Campbell
P.O. Box 945
Pulaski, VA 24301
counsel for plaintiffs

Seen and objected to:

/s/ Joseph B. Shumate, Jr.
P.O. Box 2092
Pulaski, VA 24301
defendant pro se

§8.01-623

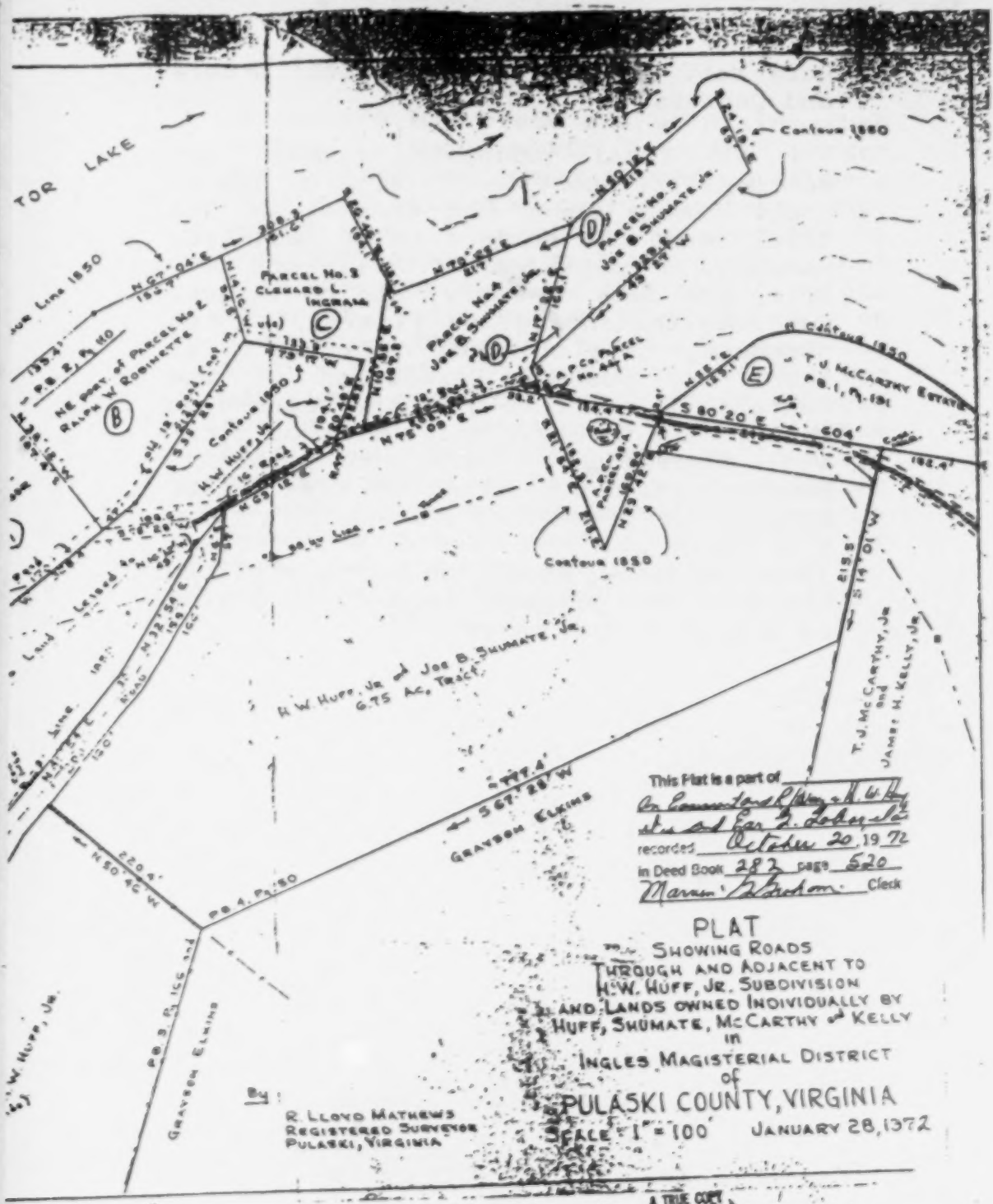
Injunction against decree subject to bill of review; limitations to bill of review. -- A court allowing a bill of review may award an injunction to the decree to be reviewed. But no bill of review shall be allowed to a final decree, unless it be exhibited within six months next after such decree, except that a person under a disability as defined in §8.01-2 may exhibit the same within six months after the removal of his or her disability. In no case shall such a bill be filed without the leave of court first obtained, unless it be for error of law apparent upon the face of the record. (Code 1950, §8-613; 1977, c. 617.)

§33.1-202

Landowners may erect and maintain gates across private roads. -- Any person owning land over which another or others have a private road or right-of-way may, except when it is otherwise provided by contract, erect and maintain gates across such roads or right-of-way at all points at which fences extend to such roads on each side thereof; provided, however, that a court of competent jurisdiction may, upon petition, where it is alleged and proved by petitioner that the gates have been willfully and maliciously erected, may require the said landowner to make such changes therein as may be necessary and reasonable in the use of said roads for both the landowner and the petitioner. (Code 1950, §33-119; 1952, c. 695; 1970, c. 322.)

Rule 1:1. Finality of Judgments, Orders and Decrees.

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge.


TOR LAKE
Contour 1850
Parcel No. 3
Cleland L. Ingram
Parcel No. 2
Joe B. Shumate, Jr.
Parcel No. 1
Joe B. Shumate, Jr.
Parcel No. 5
Joe B. Shumate, Jr.
A.P.C.O. Parcel
No. Acre A
T. J. McCarthy Estate
P.B. 1, Pg. 181
NE part of Parcel No. 2
Ralph W. Robinette
H. W. Huff, Jr.
H. W. Huff, Jr. and Joe B. Shumate, Jr.
6.75 Ac. Tract
Grayson Elkins
T. J. McCarthy, Jr. and James H. Kelly, Jr.
This Plat is a part of
Deed recorded October 20, 1972
in Deed Book 282 page 520
Marion B. Gordon Clerk
PLAT
SHOWING ROADS
THROUGH AND ADJACENT TO
H.W. HUFF, JR. SUBDIVISION
AND LANDS OWNED INDIVIDUALLY BY
HUFF, SHUMATE, McCARTHY & KELLY
IN
INGLES MAGISTERIAL DISTRICT
OF
PULASKI COUNTY, VIRGINIA
SCALE 1" = 100'
JANUARY 28, 1972
By:
R. LLOYD MATHEWS
REGISTERED SURVEYOR
PULASKI, VIRGINIA
A TRUE COPY
TESTE
R. GLENWOOD LOCKAMY, CLERK
BY: [illegible] D.C.

BEST AVAI

Plaintiff's Exhibit
A
Meridian
A P Co. Dwg No B-3582
Pg 2, 11 86
Town
A P Co
Contour Line 1032
Plantation Subdivision
P B 3 Pg 166
H W Huff, Jr.
Oscar G Kimsey
A P Co

LABLE COPY

(2)

Supreme Court, U.S.
FILED
JAN 11
CLERK

No. 95-921

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

JOSEPH B. SHUMATE, JR.,

Petitioner,

V.

H.W. HUFF, JR.
THOMAS J. McCARTHY, JR.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Supreme Court of the United States have appellate jurisdiction under 28 U.S.C. §1257 to review a decision by the Supreme Court of Virginia solely arising under and based on the laws of the Commonwealth of Virginia?

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No. 95-921

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSEPH B. SHUMATE, JR.,
Petitioner

v.

H. W. HUFF, JR., ET AL.,
Respondents

BRIEF IN OPPOSITION

Respondents, H. W. Huff, Jr. and Thomas J. McCarthy, Jr., by counsel, respectfully request that this Court deny the Petition for Writ of Certiorari of petitioner, Joseph B. Shumate, Jr. ("Shumate"), by which he seeks review of an order of the Supreme Court of Virginia denying his petition for rehearing of his petition for appeal to that court, by which he sought review of a final decree and permanent injunction entered against him by the Circuit Court of Pulaski County, Virginia.

STATUTE INVOLVED

28 U.S.C. §1257 provides in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the Unites States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

This case solely involves issues of the real property laws of the Commonwealth of Virginia as adjudged by a Virginia state trial court and affirmed by the Supreme Court of Virginia.

After Shumate unlawfully blocked the roadway located within a private right of way, respondents, H. W. Huff, Jr. and Thomas J. McCarthy, Jr., filed suit in the Circuit Court of Pulaski County, Virginia ("state trial court") seeking a permanent injunction against Shumate to require him to remove a gate by which he had blocked the roadway and to prevent him from blocking the roadway in the future. Shumate responded to respondents' bill of complaint and

actively defended in the case.[1] After various hearings before the state trial court, and on the basis of motions for summary judgment filed by both parties, the state trial court entered a Final Decree and Permanent Injunction.[2] Rather than file a notice of appeal of this decree, Shumate elected to file a motion for a bill of review with the state trial court. The state trial court ruled that there was no error of law in the case record and that a bill of review did not lie against the prior, final decree and entered a decree denying Shumate's motion. (See petitioner's appendix 4a). Shumate then petitioned the Supreme Court of Virginia to grant him an appeal as to the latter decree. The Virginia Supreme Court denied his petition. (See petitioner's appendix 2a). Shumate then petitioned the Virginia Supreme Court for a rehearing of its denial of his petition for appeal. For the first and only time in this case, Shumate contended to the Virginia Supreme Court that it was violating his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution by not hearing his appeal *en banc* and by not overturning the state trial court's rulings. The Virginia Supreme Court denied Shumate's rehearing petition without comment. (See petitioner's appendix 1a). The effect of the denial by the Supreme Court of Virginia of Shumate's appeal was to affirm the decisions of the state trial court as correct under applicable Virginia state law.

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[1] Shumate is a frequent and persistent self-litigator.

[2] The decree reproduced in petitioner's appendix 9a is not entirely accurate. The judge of the state trial court interlined as numbered paragraph 4 of that decree, "The defendant is enjoined from closing or blocking the right of way"; in place of the language stated in numbered paragraph 4 of the decree as reproduced by Shumate.

REASONS TO DENY THE PETITION

The Supreme Court of the United States Has No Jurisdiction to Review a Decision of the Supreme Court of Virginia Which Arises Under and Is Based Solely on the Laws of the Commonwealth of Virginia.

This Court has long and consistently held that the exercise of jurisdiction over final judgments of the highest court of a state, as granted to this Court under 28 U.S.C. §1257, is limited to cases involving a "federal question." See, e.g., *Webb v. Webb*, 451 U.S. 493 (1981); *Waters-Pierce Oil Co. v Texas*, 212 U.S. 86, 112 (1909). And as reflected in Rule 10 of this Court, the federal question must be "important" or 'substantial' and genuine, not a contrived "question" having no foundation or merit. See, e.g., *Ennis Waterworks v. Ennis*, 233 U.S. 652 (1914). As a federal court, this Court has no appellate jurisdiction over an issue which does not involve matters of the constitutionality of federal or state actions under the Constitution of the United States, federal statutes, or rights, privileges, and immunities of federal origin.

This Court has also long and consistently held that for this Court to have jurisdiction over the final judgment of a state's highest court under 28 U.S.C. §1257, it must appear from the record that a "federal question" was actually and properly raised before the state court(s) and that the state's highest court actually decided a federal question. See, e.g., *Webb v. Webb*, *supra*; *Street v. New York*, 394 U.S. 576 (1969); *First National Bank of Estherville v. Estherville*, 215 U.S. 341 (1910). In cases where the decision of the state's highest court is based on state law, the decision of that state court is binding on all federal courts, including this Court.

See, e.g., *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951); *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336 (1902); *Keene v. Clark*, 35 U.S. 291 (1836). A state's highest court is the final arbitrator of the laws of its state.

There is no "federal question" present in this case, as is shown on the face of Shumate's petition. All authorities cited by Shumate in his petition are decisions of the Supreme Court of Virginia construing solely the laws of the Commonwealth of Virginia, and all of the "questions presented" by Shumate are purely issues of Virginia state law. As the orders re-printed in the appendix to Shumate's petition clearly show, the decisions of the state trial court, as set forth in both of its decrees, were based solely on issues of Virginia state law. Neither of the parties raised any issue before the state trial court even remotely involving a "federal question" because there simply was none. Likewise, the decisions of the Supreme Court of Virginia in denying petitioner's petition for appeal and in denying his petition for rehearing were based solely on Virginia state law, that court thereby affirming the decision of the state trial court as correct. As only partially reflected in the final decree of the state trial court, but fully shown by the entire record in this case, Shumate's claims were fully and properly heard and adjudicated by the state trial court and by the Supreme Court of Virginia. Both courts properly applied solely applicable and fully dispositive state law to this case.

Shumate first asserted his contrived claim of a denial of equal protection under the Fourteenth Amendment to the United States Constitution in his petition for rehearing to the Virginia Supreme Court, wherein he demanded that that court grant him an *en banc* rehearing on his appeal, after that court had denied his petition for appeal. The Virginia

Supreme Court properly refused to accede to Shumate's demand and denied his petition for rehearing. This Court has refused to review the judgment of a state's highest court when a so-called "federal question" was raised for the first time in a petition for rehearing, after that court had already denied the petition for appeal, and where that court does not pass on the claimed federal question. *St. Louis & S. F. R. Co. v. Shepherd*, 240 U.S. 240 (1916); accord, *Wabash R. Co. v. Flannigan*, 192 U.S. 29 (1904).

This Court's decision in *Webb v. Webb*, *supra*, is controlling in this case. In *Webb*, this Court held that for it to have jurisdiction to review the judgment of a state's highest court, a federal question must have been properly raised in the state court system and passed on by the state's highest court from which the appeal is made. The "principal of comity that stands behind the `properly-raised-federal-question' doctrine," as discussed as length in *Webb*, applies here. 451 U.S. at 500. In the present case, the Supreme Court of Virginia made no ruling on Shumate's claim that that court was denying him his federally guaranteed right to equal protection under the state's laws because (1) he did not make any such claim before the state trial court;[3] (2) he did not make any such claim to the Virginia Supreme Court in his petition for appeal; (3) he contrived this claim only after

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[3] Pursuant to Rule 5:25 of the Supreme Court of Virginia and a legion of that court's decisions, any issue or objection not raised before the trial court will not be considered on appeal. Further, §8.01-678 of the Code of Virginia (1950), as amended, provides: "When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed for any other defect, imperfection, or omission in the record, or for any error committed on the trial."

the Virginia Supreme Court had denied his petition for appeal; (4) he asserted this claim for the first time in his petition for rehearing to the Virginia Supreme Court; and (5) the Virginia Supreme Court properly did not give any consideration to his claim, it being untimely and improperly raised and wholly frivolous, without merit or foundation whatsoever.

Rule 14.1(g)(i) of this Court[4] requires a petitioner seeking review of a state court judgment to specify (1) the stage in the proceeding, both in the court of first instance and in the appellate courts, when the federal question sought to be reviewed was raised, and (2) the method or manner of raising it and the way in which it was passed on by those courts, with specific reference to the places in the record where the matter appears, to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. No such specifications appear in Shumate's petition simply because he never properly or timely raised any "federal question" while before the Virginia state courts. As stated by Justice White in *Webb*, "Litigants seeking to bring cases [before this Court] from the state courts should take care to comply with the jurisdictional statute and [with this Court's] rules." 451 U.S. at 501. Shumate has done neither.

There is no basis whatsoever under 28 U.S.C. §1257 or under the settled precedent of this Court for this Court to review the decision of the Supreme Court of Virginia in this case.

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[4] Present Rule 14.1(g)(i) is the successor to former Rule 21.1(h) referred to in the Court's opinion in *Webb*, 451 U.S. at 495.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

And because Shumate's petition is wholly frivolous, without any merit or foundation, respondents request this Court to award them costs, single or double, against Shumate, pursuant to Rule 42.2 of this Court.

Respectfully submitted,

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